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In The Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager
of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

BRIEF OF APPELLEE

WILLIAM LEE ALLEN
COUNSEL OF RECORD

HARRY LOUIS SHORSTEIN
COUNSEL

1300 City Hall
Jacksonville, Florida 32202

ATTORNEYS FOR APPELLEE

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CITY OF JACKSONVILLE, FLORIDA, appellee herein, elects not to include items (a), (b) and (c) of Rule 40, however, believes the question presented and statement of the case as submitted by appellant Erznoznik do not properly present the facts or the issues.

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FE-

MALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

STATEMENT OF THE CASE

On January 14, 1972, the City of Jacksonville adopted an ordinance declaring certain exhibitions at drive-in theaters to be unlawful and a public nuisance.[1]

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[1] ORDINANCE 71-752-519
AN ORDINANCE DECLARING CERTAIN EXHIBITIONS AT DRIVE-IN THEATERS TO BE UNLAWFUL AND A PUBLIC NUISANCE; PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISIONS; PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted.

On March 13, 1972, a summons was served on Erznoznik herein charging him with a violation of the ordinance, and requiring him to appear in municipal court (A-11).

Pursuant to stipulation with the city prosecutor, the municipal court proceedings were continued until disposition of a declaratory judgment action to be brought by Erznoznik (A-6).

Trial of the declaratory judgment action thus instituted was before the court without a jury (A-14 et seq).

The evidence revealed the title of the movie, which was the genesis of the proceedings, to be "Class of '74" (A-17), an "R" rated movie[2]; and that the entire screen was visible from Jack Road, George's Road and in front of the residences on George's Road (A 52-53).

The entire screen was also visible from the parking areas and the recreational area of the Resurrection Catholic Church (A 54-55), as well as residences on Tarpon Court, Moray Court and Marlin Court (A 55-56). People have parked in automobiles to watch movies being shown (A 57-58), and young people have sat in the edge of the woods along the northern boundary to observe movies being shown (A-65).

Final judgment was entered for the City of Jacksonville A-75), on the basis that the ordinance in question was a valid

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[1]continued.

Section 2. Effective Date. This ordinance becomes effective upon signature by the Mayor or upon becoming effective without the Mayor's signature. (A-13)

[2]See footnote 3 at page 10 of Brief of Erznoznik.

exercise of the police power of the City in regulating nuisances.

On appeal the District Court of Appeal, First District of Florida, affirmed the trial court (A-81), and the Supreme Court of Florida denied certiorari (A-82); hence this appeal.

ARGUMENT

A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

The approach of Erznoznik in the trial court was to treat the ordinance in question as invalid as a matter of law; so that the "trial" was sought to be restricted as though it were an argument on a motion for judgment on the pleadings (A-37).

Argument in his brief, however, states:

> "Courts are never foreclosed from inquiring into the legislative findings as nuisances of things that are not so in fact, particularly where municipal ordinances and regulations are in issue.
>
> "The thrust of the judicial inquiry is to determine whether the act or condition sought to be condemned, legislatively, tends to injure the health or to corrupt

> the manners and morals of the community."
>
> Erznoznik brief at p. 23

Evidence, both admitted and proffered, at the trial show clearly that:

1. Teenagers congregate on the shoulder of the roadway to watch the movies when "R" rated movies are shown, and scatter litter—beer cans, coca-cola paper cups, trash and broken bottles (A-49).
2. The entire screen can be seen from Jack Road, George's Road, and the residences bordering George's Road (A 52-53).
3. The entire screen can be seen from the parking area and the recreation area of the Resurrection Catholic Church (A-55), and cars have parked next to the Church to observe the screen (A-64).
4. The entire screen can be seen from Tarpon Court, Moray Court and Marlin Court residential aeas (A-55, 56).
5. Young people sit on the ground in the edge of the woods along the northern boundary of the theater to observe the movies (A-65).
6. A resident of the area who lives on George's Lane, and has three minor children, can observe the screen from her house, and it is an embarrassment to her (A-69).

Both *Chemline, Inc. v. City of Grand Prairie*, 5th Cir. 1966, 364 F. 2d 721 and *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 7th Cir. 1973, 473 F. 2d 1297, recognize that the validity of the ordinance cannot be determined in an evidentiary vacuum. In order to justify the exercise of the police power, the legislation must be supported by some

sound basis of necessity to protect the public morals, health, safety or welfare. The evidence adduced herein clearly supports the "police power" nature of the ordinance.

OBSCENITY TEST AS INAPPLICABLE

As stated by the trial judge herein:

> "The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. . ." (A-78)

Under the guidelines of this court set forth in *Miller v. California*, 413 U.S. 15 (1973) as applied to motion pictures by *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the ordinance in this case could not stand, because the mere showing of,

> ". . . human male or female bare buttocks, human female bare breasts, or human bare pubic areas[3] . . ." (A-13),

without more, could not be said, to be the showing of,

> ". . . works which taken as a whole, appeal to the prurient interest in sex, whch portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political, or scientific value."
>
> *Miller*, supra, at 413 U.S. 24

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[3]"Pubic" is defined as: Pertaining to, or located in the region of the sex organs." Schmidt, Attorneys' Dictionary of Medicine (1972 Ed.) page 668.76

But, as stated by this court in *Miller*,

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. . ."
>
> 413 U.S. at 25

Paris Adult Theater I v. Slaton, supra, did not involve a drive-in theater.

What may be proper or appropriate for showing to adults in an enclosed theater, where they have voluntarily and freely "paid their money and took their choice," can have no relevance to the showing of such films on an outdoor screen visible to the public at large. Nudity is thus magnified and projected several times its normal size; so that if the film were of a "streaker,"[4] the streakor would assume gargantuan proportions as his appearance assaulted the innocent streakees.

> "Indecent exposure—the wilful and intentional exposure of the private parts of one's body in a public place in the presence of an assembly—is an offense at common law. . ."
>
> 50 Am Jur 2d Lewdness, Indecency, etc. §16, p. 472

Thus the convictions of nude bathers in the White River National Forest on a charge of indecent conduct, for swimming in the nude, and sunning themselves on a river bank, while eating watermelon in the nude, was properly upheld. *United States v. Hymans*, 10th Cir. 1972, 463 F. 2d 615.

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[4]A fad which apparently has fizzled out almost as quickly as "hula hoops."

Certainly if an act itself if done in the flesh can be punished, without any violence being done to the Constitution, films of such act should also be subject to punishment.

If there be no prohibition to the showing of commercial films at drive-in theaters, visible to public streets and public places, of human buttocks, human female breasts, or human pubic areas, then there could be no valid prohibition to showing homemade movies in one's front yard for the edification of the neighbors, or displaying the real thing. Unless, we say that on the one hand the showing of such movies for profit is "speech," and the walking around nude in public places or the showing of homemade movies is "conduct." c.f. *Hoffman v. Carson*, Fla. 1971, 250 So. 2d 891, 49 ALR 3d 1078, app. dismd. 404 U.S. 981, upholding the conviction[5] of a "go-go" dancer for going totally nude and exposing her sex organs in the course of her employment at a Jacksonville, Florida cocktail lounge.

NUISANCE

No citation of authority should be needed for the time-honored proposition that municipalities have the right or, more correctly, the duty to abate a public nuisance.

The judgment of the trial court (A-75) makes it clear that

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[5]Under Florida Statute 800.03 providing in part:

"It shall be unlawful for any person to expose or exhibit his sexual organs in any public place or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or so to expose or exhibit his person in such place, or to go or be naked in such place."

the decision was based on the police power of the City and more specifically, its power to declare and abate public nuisances. The court cited *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721, *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967) and *Breard v. City of Alexander*, 341 U.S. 622, 69 S.Ct. 742, 95 L. Ed. 1233 (1951) in support of its decision. *Chemline* recognized the police power of the municipality involved.

A leading case, dealing with the operation of an outdoor theater as a nuisance is *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W. 2d 260 (1968) in which the Supreme Court of Michigan held, on facts almost identical to the case at bar, that operation of the theater constituted a public nuisance, and that such course of action did not come within the First and Fourteenth Amendment protections of speech and press. See annotation: Drive-in theater as nuisance, 93 ALR 2d 1171.

See also the excellent opinion of the Court of Appeals of Arizona in *Cactus Corporation v. State ex rel. Murphy*, 14 Ariz. App. 38, 480 P.2d 375 (1971).

In the same vein the comment of Justice Douglas in dissent in *Roth v. United States*, 354 U.S. 476 (1957), that,

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."
>
> 354 U.S. at 512

And last, but certainly not least, the decision of *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721, upholding an ordinance greatly similar to the Jacksonville ordinance, without, however, including the prohibition against showing the pubic area. *Chemline* was cited with approval in *United*

States v. One Carton Positive Motion Picture Film, 2d Cir. 1966, 367 F.2d 889, 898.

Since, *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 473 F. 2d 1297, disagrees with *Chemline*, the following comments are in order:

The *Cinecom* decision analyzes the Fort Wayne ordinance as if it were obscenity legislation. Using the "concept of variable obscenity" exemplified in *Ginsburg v. New York*, 390 U.S. 629 (1968), as a measuring rod, the Court finds the ordinance unconstitutional. Variable obscenity is a term that describes the ability to lower the obscenity standard where the matter involved is knowingly directed at a more susceptible group of people such as children. This reasoning is fallacious. It fails to recognize that obscenity is not the cutting edge to be used here. The question before the Court is, are there significant countervailing First Amendment considerations to overcome the city's traditional power to declare a noxious activity a public nuisance? The answer is arrived at by a simple balancing process, and that answer is *NO* where the public's constitutional right of privacy is trampled upon while the theater operator's First Amendment rights are hardly affected at all. The content of the film is not affected. The right of persons to see the film is in no way jeopardized. If people want to seek out nude materials, they may do so. The ordinance merely says it may not be publicly thrust upon them. (See concurring opinion of Chief Justice Burger in *Rabe v. Washington*, 405 U.S. 313, 316 (1972.)

In response to this argument, the Court in *Cinecom* notes that only public places are involved. There was no evidence indicating that the visual presentations were so obnoxious to those walking in the area as to preclude their avoidance simply by averting their eyes; thus substantial privacy interests were not involved in an essentially intolerable manner. *Cohen v. California*, 403 U.S. 15 (1971). But this finding doesn't comport with the facts in Erznoznik; children playing at the church and on the street could not be expected to keep their eyes averted at all times.

To demonstrate where the *Cinecom* court got off the track we need only cite one innocuous sentence: "As the district judge here recognized, this is not an obscenity case in the *typical* sense." (emphasis added) 473 F.2d 1297, 1301. This is not an obscenity case in *any* sense. Obscenity statutes are constitutional because obscene matter is not considered speech at all; it is outside the purview of the First Amendment. Time, place and manner restrictions on First Amendment rights are only constitutional if they are reasonable; the ordinances in controversy are much more closely akin to noise level ordinances than they are to obscenity laws and they must only meet the reasonableness test and not an obscenity standard. Unfortunately, the similarity of the subject matter causes the issues to be confused.

CONCLUSION

The decision herein appealed should be affirmed.

Respectfully submitted,

WILLIAM LEE ALLEN
Counsel of Record

HARRY LOUIS SHORSTEIN
Counsel

1300 City Hall
Jacksonville, Florida 32202

ATTORNEYS FOR APPELLEE

DATED: December 12, 1974.

Proof of service December 12, 1974, by separate instrument.